No. 9809

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NELSON TAYLOR, J. R. MASON, GILBERT MOODY, and N. O. BOWMAN,
Appellants,

vs.

PROVIDENT IRRIGATION DISTRICT,
Appellee.

APPELLANTS' REPLY BRIEF.

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PRELIMINARY.

In this reply brief appellants will confine their argument strictly to an answer to the brief of appellee, and for convenience will adopt the same order as appears from appellee's brief.

The instances in which appellants have gone "outside the record" are distinctly indicated in appellants' opening brief. Appellee complains that appellants have distorted the facts in many instances. Such is not the case. Obviously, it was the duty of the appellee to bring any such alleged distortion to the attention of this Court in appellee's brief.[1]

1. Appellants acknowledge an error at page 10 of their brief. There it is incorrectly stated that 3 coupons of Taylor due August 15, 1930 are not payable at all under the plan.

If appellants understand what it means to "raise an objection" then it is not true as stated at page 1 of appellee's brief that the only "objection" raised to the plan of composition in the District Court was appellants' first proposition: That the plan is unfair to appellant Nelson Taylor in that it did not provide for the payment of his three bonds with accrued interest in full.

The record shows that the five remaining propositions were also properly "raised" in the District Court as follows: Second proposition: The point that the evidence was insufficient to support the findings as to fairness and that the findings do not support the decree. Rule 46 of Rules of Civil Procedure for District Courts provides that exceptions are no longer necessary and Rule 52 provides amongst other things that "Requests for findings are not necessary for purpose of review". The same rule provides: "When findings of fact are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings or has made a motion to amend them or a motion for judgment."

Third Proposition: That the plan of composition is unfair. This objection is raised by the answer. (Tr. pp. 32, 35, 36, 37.) See paragraphs V, XI, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, and other portions of the answer. See also disapproval of the findings, Tr. p. 212. Note also appellants' statement at Tr. p. 197 where counsel for appellants pointed out the Supreme Court had declared that a plan could not be adjudged

fair merely because of the percentage of bondholders' consent.

The Bankruptcy Act, Title 11, 403 (e) U. S. C. provides that the judge shall make written findings and enter a decree confirming the plan if satisfied (1) that it is fair; (2) that it complies with the statutes; (5) that the plan is in good faith; (6) that the petitioner is authorized by law to take necessary action, etc.

Inasmuch as the judge is required to make these particular findings and these very points are in substance the ones which appellants raise, it would seem that the requirement is statutory and that no further "objection" need be made.

Furthermore, the same statute provides the means by which objections can be raised in the District Court. Subsection (b): "At any time not less than 10 days prior to the time fixed for the hearing, any creditor of the petitioner affected by the plan may file an answer to the petition controverting any of the material allegations therein and setting up any objection he may have to the plan of composition." Obviously, the burden of proof is upon the petitioner and it is not necessary that the appellants should introduce any evidence whatsoever. This same section of the statute provides: "At the hearing, or a continuance thereof, the judge shall decide the issues presented and unless the material allegations of the petition are sustained, shall dismiss the proceeding." Furthermore, a case of this character is not one where there are definite issues between the plaintiff and the defendant, but it is incumbent upon the Court to search out the facts and make findings upon them. The rule

is stated in *First National Bank v. Flershem,* 290 U. S. 504, 525 per Mr. Justice Brandeis:

> "In justifying the action taken, the Court of Appeals called attention to the fact that the non-assenting creditors had not introduced any evidence to prove their contention that the sale should not be confirmed. In view of the undisputed facts stated above, the introduction of such evidence was not indispensable. The failure to secure an adequate price seems to have been due, not to lack of opposing evidence, but to the mistaken belief that it was the duty of the court to aid in effectuating the plan of reorganization, since a very large majority of the debenture holders had assented to it. Moreover, the court stood in a position different from that which it occupies in ordinary litigation, where issues are to be determined solely upon such evidence as the contending parties choose to introduce. In receivership proceedings, as was held in National Surety Co. v. Coriell, 289 U. S. 426, 436, 53 S. Ct. 678, 77 L. Ed. 1300, every important determination by the court calls for an informed, independent judgment; and special reasons exist for requiring adequate, trustworthy information where the jurisdiction rests wholly upon the consent of the defendant who joins in the prayers for relief. It would be unreasonable to impose upon a few dissenting creditors the heavy financial burden of making an adequate appraisal supported by the testimony of competent experts, where, as here, the assets include extensive plants and equipment located in nine states."

Fourth Proposition: That the Court erred in not following the local law applicable to this district and which was the law of the case. This objection was raised by the answer. (Tr. pp. 34, 37, 39.) See also Tr. p. 69.

Fifth Proposition: That the plan of composition is not presented in good faith. The allegation of the petition that the plan of composition is offered in good faith is denied in the answer (Tr. p. 32), and as a separate defense. (Tr. p. 39). (See also Tr. p. 47, amendment to answer.)

Sixth Proposition: The plan of composition is not supported by local law. This objection is also raised at the same places in the answer. (Tr. pp. 32 and 39.)

STATEMENT OF THE CASE.

The appellants in their opening brief (Tr. pp. 7 to 26, inclusive) have made a complete and very fair statement of *all* the evidence introduced. Appellants did not merely present that evidence which was more favorable to them but in their summary made a condensed restatement of all the evidence. Appellants assume that good practice requires the appellee to controvert in its brief the statement of the case by appellants if incorrect, but that appellee need not re-controvert. (Rules, this Court No. 21(3).)

Appellee makes pointed reference to the testimony of Mr. H. E. Vogel, member of the California Irrigation Districts Securities Commission since 1931, casting such serious doubts upon the integrity of the appraisal made by his commission when the *original* bond issues were issued, which serve equally to cast the same character of doubt upon the undisclosed appraisals for the new proposed bond issue.

Appellee at page 5 of its brief calls attention to the fact that the R. F. C. in granting a loan to the district specified that a sum of not to exceed $2100 was to be used for expenses. It is not clear how a fee of $20,000 to fiscal agent Lambert can be justified when the R. F. C. specified that only $2100 should be used for all expenses, which presumably includes Mr. Freeman's fees, as well as Mr. Lambert's.

Appellants flatly deny the statement on page 7 of appellee's brief that the "uncontradicted evidence" shows that the district was "insolvent" or that the plan of composition is fair or equitable. In fact appellants present the point that a finding of fairness and equitableness is a conclusion of law to be drawn from facts found. Appellants contend that there is no sufficient evidence upon which to base a finding of either solvency or insolvency. Appellants pointed out in their opening brief at page 8 that no exhibits of any character were introduced into evidence by the district to show the assets of the district nor was any balance sheet, crop report or financial statement of the property and affairs of the district shown whatsoever, either orally or by exhibit. It is not easily seen, therefore, how there can be a claim that "uncontradicted evidence" shows the district to be insolvent.

Under the Bankruptcy Act, inability to meet current obligations is not insolvency, but the test is rather the relation of the debtor's total assets to its liabilities. *Cusick v. Second National Bank,* 115 Fed. (2d) 150.

Appellee quotes Vogel's testimony at page 4 of its brief that way back in 1924 the highest number of hold-

ings in the district was 37, and when they got down to 1932 there were only 10 ownerships, "mostly in the hands of banks". This shows the background and foundation of the whole case. This has never been a district where there were many small holdings. They have always been banks and absentee financial interests. The same struggle is going on widely today to see who is going to get the future rent from irrigated lands.

It is claimed at page 5 of the brief that this land is in joint ownership with the State and Reclamation District 2047, yet the evidence shows (Tr. p. 191) that the income from the land as well as the water toll is being collected by the Provident Irrigation District, and there is not any evidence anywhere that any of this income or rent or water tolls was ever paid either to the state, county or Reclamation District 2047.

A statement quoted in appellee's brief at page 8 to the effect that the excluded land has no value considering the debts that are on the land is merely a statement that the rental value of the land is worth less than the total of all the taxes and assessments and is not a statement that the land itself is valueless. The fact that it brings in rent is evidence that it has some value. The evidence at Tr. pp. 123, 127 shows the expectations of the district re this land. The witness will tell the Bankruptcy Court one story on value, and the Court which acquires it for the Biological Survey another story of value.

REPLY TO ARGUMENT.

FIRST PROPOSITION. THAT THE PLAN IS UNFAIR TO NELSON TAYLOR IN THAT IT DOES NOT PROVIDE PAYMENT FOR HIS THREE BONDS.

Appellee with apparent great deliberation misstates the argument of appellant Nelson Taylor. At page 9 of appellee's brief appellee fails to add the following sentence to the portion quoted from appellants' brief, which sentence read: "So long as the district was operating as a solvent district it was required to make these payments pursuant to that section," citing *Moody v. James Irrigation District,* 114 Fed. (2d) 685, 688.

The argument was not presented (as appellee's counsel well understands) that the plan is unfair *merely* because it does not adopt the provisions of Section 52 of the California Irrigation Districts Act requiring payments in the order of presentation as a part of the plan, but that the plan is unfair because in this particular instance *Nelson Taylor should have been paid during the time that the district was making payments as required by that section*: but is deliberately not paid now, thus working a special and particular hardship on him. As appellants show at page 29 of their brief the only reason that the bonds of Taylor were not paid and that subsequent bonds were paid was that the district deliberately and unlawfully withheld payments on the erroneous theory (Tr. pp. 181, 189) that the bonds had outlawed, and continued to take that stand until the decision in the case of *Moody v. Provident Irrigation District* (85 Pac. (2d) 128, 12 Cal. (2d) 389) in which it was determined to the contrary. The plan of composition cannot be fair nor in good faith

if it deliberately condones a wrong that was done to Nelson Taylor. The wrong that was done to him was that he should have been paid long before the filing of the bankruptcy petition and instead the district preferred another bondholder. Briefly re-examining what happened, conceded at page 12 of appellee's brief that the three bonds of Mr. Taylor were all presented for payment on January 30, 1931. They were due August 15, 1930. (Tr. p. 41.) Since they were due in 1930 they could have no coupons due January 1, 1931. The plan of composition provides for payment of all coupons due January 1, 1931, many of which were presented for payment after Nelson Taylor's were presented. (Tr. p. 180.) The district contended that Nelson Taylor's bonds were outlawed, and so did not pay them. (Tr. p. 181.) No other reason is advanced in the evidence for nonpayment. All other bonds due at the same date have been paid, and not only that, but two bonds, due subsequently, were paid in full in 1935. (Tr. p. 118.) Other bonds also were liquidated after 1931. (Tr. p. 181.) The two bonds that were paid in 1935 did affect the rights of Nelson Taylor because as admitted by the district witnesses, Nelson Taylor would have been paid in place of those two bonds except for the erroneous contention that his bonds had outlawed. Furthermore, not only were these two other bonds paid, but in the same year the district paid $3120 of interest coupons and $1328.13 interest on registered bonds and coupons. (Tr. p. 118.) The same year it received over $1600 in payment of assessments, mostly for the year 1930, and over $25,000 income from the land, and in 1937 additional assessments and over $23,000 in-

come from land (Tr. pp. 191, 118), all of which was held in the case of *Provident Land Corporation v. Zumwalt,* 85 Pac. (2d) 116, 12 Cal. (2d) 365, insofar as the surplus of $10,000 was concerned, should have been paid to bondholders in the order of presentation. The district (strangely) received a payment of $5500 of assessments in the year 1939. (Tr. p. 195.) The statement at page 13 of appellee's brief that Taylor's bonds could not have been paid doesn't jibe very well with the surplus claimed about the same time and which was a bone of contention in *Provident v. Zumwalt.* They had $10,000 surplus to buy up bonds of their friends but nothing to pay bonds with as required by law and Section 52. Mr. Freeman didn't think it was an unjustified priority to unlawfully buy up those bonds at 20, but now he thinks it would be unjustified to pay three bonds which they now admit should have been paid long ago. The finding of the Court that the plan is not unjust or unfair for the failure of the plan to provide for this payment is one conclusion of law which we attack as being unsupported by any facts.

SECOND PROPOSITION. THAT THE PLAN IS NOT FAIR AND EQUITABLE AND THAT THE FINDINGS DO NOT SUPPORT THE DECREE.

A. The findings do not support the decree.

The contention of appellee is that because the Court made a finding *in haec verba* that "the petitioner is insolvent or unable to meet its debts as they mature" and that "the plan of composition as offered by the petitioner herein is fair", therefore the findings do sup-

port the decree. Appellee at page 15 of its brief cites *West Coast Life Ins. Co. v. Merced Irrigation District,* 114 Fed. (2d) 654, 677; *Bekins v. Lindsay-Strathmore Irr. Dist.,* 114 Fed. (2d) 680, 685; *Moody v. James Irr. Dist.,* 114 Fed. (2d) 685, 689. This Court examined the evidence in those cases and did not rest its decision upon the findings of the Court. This Court re-examined the cases *de novo* and based its opinion and judgment in those cases upon a complete examination of all the evidence. Consequently we find no statement in appellee's argument under this proposition requiring further argument.

B. The evidence is not sufficient to support the findings.

Appellee contends that the case of *Consolidated Rock Products Co. v. DuBois,* 61 S. Ct. 675, since it involves bankruptcy of a private company, has no application to the case at bar. Well, that is something this Court will have to decide. Conceded that the bankruptcy of a public entity is very different from that of a private concern, there must be some basic rule of law that would be applied to these cases. And if that basic rule of law is not to be found in the *Consolidated Rock Products* case or the *Los Angeles Lumber Products* case, where then is it to be found! Appellants contend that those cases present fundamental principles which should be applied in the instant case.

It is the contention of appellee that the primary question to be determined (appellee's brief p. 16) is "What debt load can the lands of the district reasonable bear?" Admittedly the question of what debt load the land can reasonably bear has some bearing on the question of

fairness and discrimination, but it is not the whole question. Other subjects are, apart from discrimination, bad faith, the question of what has been done with the district's assets, the solvency or extent of insolvency of district, the value of the district's assets. Here this district is going to be practically without any debt in just a few years. Even if conceded that the lands in private ownership can only carry a debt of $14.50 per acre at the present time, they are not for long going to carry even that.

THIRD PROPOSITION. THE PLAN IS UNFAIR.

Under this heading appellants will address themselves solely to the discussion occurring on pages 27 and 28 of appellee's brief with reference to the leasing of the district's own land, for the reason that the remainder of appellee's answer is merely a contravention of appellants' argument.

Now it was not incumbent upon appellant to suggest any different plan than the one presented. But the matter of leasing the district's own land was presented as an obvious alternative to any plan. The very matter that was proposed, the method, namely the leasing of the district's own land, is today being practiced in California by many different districts. For example, Reclamation Districts 108, 1500, 784, and the same policy has been practiced for a long period of time by the Provident Irrigation District. In many of these cases the various taxing agencies are making arrangements to liquidate the other liens or annual taxes against the land. Much latitude along this line is allowed by the various Cali-

fornia laws. For example, the City of Turlock, of which the undersigned counsel is city attorney, has acquired the title of the State of California and of the Turlock Irrigation District to all lands within the City of Turlock to which the City has taken title. It purchased the interests of the Turlock Irrigation District for $10.00 and of the State of California for a few hundred dollars. It has already resold over 100 town lots for over $15,000. Glenn-Colusa Irrigation District maintains a trust fund out of which it pays the overlapping agencies. Sec. 3897d, California Political Code, permits the irrigation district to acquire at less than the overlapping delinquent taxes full title from the state and the reclamation district. That undoubtedly is what the Provident Irrigation District is doing and proposes to do—namely, to liquidate the claims of these other state agencies. Once having acquired the title, then the rule in *Anderson-Cottonwood v. Klukkert* (13 Cal. (2d) 191) comes into full force. These other agencies can not tax the lands at all. In fact, they cannot tax it anyway. Furthermore, Section 3773 of the Political Code did not provide in 1930[2] when the bonds were issued that the state was the sole collector and landlord of state-owned land, and furthermore, two additional points are very important with respect to this. The first

2. In re 3773 P. C. the quoted section from appellee's brief at page 28 was not added until 1935 by Statutes of California 1935, page 1789 at 1790. Prior to that time the statute merely provided that "from and after the date of recording of the deed to the state as provided in Sec. 3785 of this code, the state shall be entitled to rent, to receive and collect all rents, issues and profits arising in any manner from the property so conveyed". (See Stats. 1927, p. 1646 at 1647.) This is a similar provision to that contained in the statutes creating all taxing agencies. It can be confidently stated by appellants that the practice which counsel suggests is the law with regard to rentals is not followed anywhere in California, and that irrigation districts throughout the state are now in fact taking and receiving the rentals from such land as a general practice. This is the same old point that counsel for petitioner so violently argued and with such little success in the case of Provident Land Corporation v. Zumwalt.

is, that since that section did not so provide, the present act is a violation of the contract held by the bondholders, therefore void. And the second point is that the irrigation district gets title to the land in 3 years, whereas the state gets title in 5, and so the district would own the land and collect the rent long before the state could ever acquire any sort of title. Thus the section could not come into operation. And finally, such is not the practice. Irrigation districts of the state are in fact leasing thousands of acres of land which they have acquired for unpaid taxes, and such has long been the practice in Provident Irrigation District. The facts in Mr. Freeman's case defeat his very argument. Under Section 3787 of the Political Code any deed of the state is subject to irrigation district taxes. (See also Section 3480 of the Political Code, Section 48 of the California Irrigation District Act, Section 3466 of the Reclamation District Act) from which it appears certain that all deeds of all of these other taxing agencies are expressly made subject to the irrigation district lien, but the irrigation district deeds are "free of all encumbrances".

In the *La Mesa* case (*La Mesa, etc., I. D. v. Hornbeck,* 216 Cal. 730), the first opinion held that the title of the irrigation district wiped out the county and all other interests. On rehearing it was modified on the then announced theory that the irrigation district acted in a proprietary capacity, but in the case of *El Camino Land Corporation v. El Camino Irrigation District,* 12 Cal. (2d) 378 and the case of *Glenn-Colusa Irr. Dist. v. Ohrt,* 31 Cal. App. (2d) 619, it reversed this when it held that an irrigation district is "exclusively governmental". This is re-

affirmed by the Klukkert decision. No doubt therefore remains but that the title of the irrigation district under California law is superior to all other titles.

It makes a lot of difference in what public trustee state law vests the ownership of land tax free. When it is vested in an irrigation district the full economic rental value of the land is kept, without the necessity to share the rent with any other public or private interest. If the land has little rental value the bonds of appellants will simply never be paid. The land will not be any more or less valuable to a user should the petition be approved or denied. Those to whom the district so recently conveyed title deeds acquired the title "subject to an outstanding interest" and they are estopped to deny its validity.

The facts that appellants' bonds are a burden that are preventing or will prevent the county or other overlapping tax units from collecting taxes on the land of appellee is a matter that should be addressed only to the legislature. Surely there is no more equity in appellee using the proceeds from its lands (whether from sale or lease), in paying junior or less than junior liens than there would be for a private bankrupt applying his money in paying off the second mortgage at the very time that he was seeking to scale down the first mortgage. Appellee has not even attempted to explain how it is or will be in any way benefited by this unjust application of "trust funds". Others than the district and its creditors are benefited. It is clearly their duty under state law to administer all land owned for the "uses and purposes of the act" as provided by Section 29 of the California Irrigation District Act and it had no possible need nor reason for surrendering its

title except to create undeserved privilege for certain interests.

Truly we are engaged here not merely in a lawsuit but in a titanic struggle between land speculators on the one hand and the public welfare on the other. In the *Provident* case Mr. Freeman took the very strong position as the Court said "defendants and amici curiae vigorously contend that the purposes of the act are to construct irrigation works and provide for irrigation of the lands of the district. They concede that the district is authorized to borrow money for these purposes, but assert that the creation of debts is not one of its purposes. They concede that the act requires repayment of the money borrowed but assert that this is not one of its purposes." The Court delivered a stinging rebuff to Mr. Freeman in this case, saying: "This type of argument however tends to prove too much, for it is difficult to conceive of a legitimate use of any funds of the district derived in any manner for something which is not a purpose of the district." And going on to say: "But laying aside quibbles as to the exact meaning of the phrase "uses and purposes" declared that the payment of bondholders is one of the purposes of the act, and that "the land is the ultimate and only source of payment of the bonds. It can never be permanently released from the obligation of the bonds until they are paid." Mr. Freeman contended, unsuccessfully, may it be said, that the only source of payment is that of assessment, as declared in the case of *Mulcahy v. Baldwin,* 15 Pac. (2d) 738, 316 Cal. 517, where the Court said: "The declared plan of the Irrigation District Act is that the holders of outstanding bonds of the district have the right

to enforce their demand solely by an annual assessment on the lands in the district. Such is their contract." As we pointed out in our opening brief, Mr. Freeman and his client sought to pay 20¢ to certain friends out of turn out of alleged surplus moneys derived from land rentals, and contended that these land rentals did not belong to the bondholders but could be used by the district for any other purpose, and therefore that the board of directors was properly authorized to acquire any particular block of bonds, whether due or not, in spite of the fact that there was over $300,000 in claims against the district long due and unpaid. But as indicated and shown by the decision of the Supreme Court in strong language condemned this type of unlawful action and held flatly that the land rentals also secure the bond issue.

Therefore it is easy to see why appellee should now again suddenly and with such violence jump upon this proposition. They have been told once by the Supreme Court of California that land rentals do secure the bonds and now they attempt to argue the contrary to this Court.

And may it here be noted that the *Provident v. Zumwalt* decision was written 6 months after the decision of the United States Supreme Court in *U. S. v. Bekins* upholding the amended Municipal Bankruptcy Act and with consequent full knowledge of the import of that decision, and with obvious awareness of the fact that many California irrigation districts were seeking compositions under that statute.

Appellee seems to seek to make an argument of his contention that the plan "suggested by counsel" could not be carried out, even if it were feasible, which he says it is

not. Now appellants were not suggesting any plan except the spirit and letter of the law as enacted by the legislature and interpreted and defined by the Supreme Court of California in *Provident v. Zumwalt* and in the *Klukkert* and *Ohrt* cases, supra.

Now, if the state is entitled to the whole rent from tax delinquent land it can also convey title deed to the land. This is obvious from a practical point of view because the estimated future net rent from land, capitalized is the whole "value" of land. Hence, if the state can keep all the rent from the land, it can obviously convey title free and clear of any and all taxes or assessments past or future, and it needs no citation of authority to indicate that such would be an unconstitutional invasion of the rights of appellants. In fact if the state can do that, then why this bankruptcy proceeding at all? What is the right and duty of the state under Section 3773? Having acquired title to the lands in the Provident Irrigation District to appropriate to itself all the rents, issues and profits therefrom "exclusively", then what is the need of any bankruptcy proceeding whatsoever? It would be an idle act, since there would be no obligation to pay any of the Provident Irrigation District bonds and surely no need to appeal to the Federal Court. The plan could not then be in good faith.

That brings up the question, just who would be helped by this petition? The land has all been owned by the state for years. How could the state or any person be hurt if appellants are allowed to hold their bonds? It might even be an unlawful gift of public funds for this district to pay out money to any bondholders because they are not obli-

gated to do so under the construction of Section 3773 placed thereon by counsel for appellee. Reference might here be made to the recent case of *El Camino Land Corp. v. Board of Supervisors,* 2 Cal. Dec. 724, 110 Pac. (2d) 1046, where the Supreme Court of California denied the petition for rehearing after the decision of the Third District Court of Appeal in which that Court refused a writ to order the levy of an assessment for irrigation district bonds.

Since the decision in that case, it seems even more obvious that there is no possible need nor necessity for this bankruptcy proceeding.

FOURTH PROPOSITION. THE COURT ERRED IN FAILING TO FOLLOW THE LAW OF THE CASE.

Here again counsel for the district cleverly but deliberately misconstrued the arguments of appellants to this Court. This was not the argument which was made in *West Coast Life v. Merced Irrigation District,* 114 Fed. (2d) 654, nor does the decision in that case apply to the argument here. It is an untrue, absurd statement that counsel makes on page 30 when they say "similar contentions are also rejected" in the *Bekins* case and the *Lindsay-Strathmore* case and the *Palo Verde* case.

It is perhaps unnecessary to review the argument under the fourth proposition and sufficient to point out that appellee has utterly evaded argument on the point. There is a difference between *stare decisis* and *res judicata.* There is a difference between a decision which decides a law generally and one which decides the law of your case.

In fact, there is never any occasion as a rule to argue about the law of the case or *res judicata* or estoppel if you are supported by the general law. It is only in a case where you are or think you may not be supported by the general law that you contend that a different rule or a particular rule should apply in your case. That is the situation here.

Appellee is surely not entitled to the "extraordinary privilege of two separate trials, one state and one federal, on an identical issue of controverted fact" even where one is a bankruptcy Court, as held in *Arkansas Corp. Com. v. Thompson,* 61 S. Ct. 888, 891.

FIFTH PROPOSITION. THE PLAN IS NOT PRESENTED IN GOOD FAITH.

Undersigned counsel may have doubted the propriety of presenting a portion of his argument, but quite evidently he concluded that it was proper to present it. Referring to the matter shown by the appendix to appellants' opening brief it is suggested that the matters there are now up for decision in the State Court and that the State Court is the place where they will be decided and that it seemed appellants' obligation to refer to those matters there pending. Other points as to good faith were presented in the opening brief which will not be here reviewed and which were in no sense outside the record.

SIXTH PROPOSITION. THE PLAN OF COMPOSITION IS NOT SUPPORTED BY LOCAL LAW.

Appellee now presents the issue whether, and there lies the issue, the plan for refunding the bonds of the district is the same plan as the plan of composition. Whether it should be, it seems to appellants that if money is to be taken out of the trust funds of the district in order to pay the bondholders a part of the consideration for the surrender of their bonds that that most distinctly is a part of the plan of composition. This Court, therefore, will have to determine whether or not, under the statement made in appellants' opening brief and the facts of this case (1) it was necessary for the electors of the district to vote upon the plan for refunding bonds or the plan of composition; (2) approval of the Districts Securities Commission is necessary. They are or should be one and the same plan. Appellee apparently concedes they were different. If so, it is fatal. The attorney general on April 10, 1934 in opinion No. 1-9264 held, referring to Sec. 32a of the California Irrigation District Act: "It is clear from the foregoing that any plan for funding or refunding the bonds of the district must be approved by the California Districts Securities Commission * * *."

Order No. 10 of the Districts Securities Commission (Tr. p. 149), purports to approve the "proposed plan". (Tr. p. 154.) The resolution refers to the contract with the R.F.C. under Stats. 1917 p. 243 as amended and Sec. 32aa to 33ee of the California Irrigation District Act. (Tr. p. 153.) The proposition voted upon by the electors was set forth at Tr. p. 163, from which it does not appear that the electors voted upon a proposition to pay interest

coupons in addition to the $200 per bond. Either the electors were required to vote on this proposition or they were not, and that is an issue for the Court to decide, as well as the issue as to whether or not the District Securities Commission was required to approve not alone the plan for refunding bonds but the plan of composition, and whether the plan of composition can be something different from the plan for refunding the bonds of the district.

Appellants respectfully submit that the decree should be reversed.

Dated, Turlock, California,
August 27, 1941.

W. Coburn Cook,
Attorney for Appellants.